Straughter v Thor Shore Parkway Devs., LLC
2020 NY Slip Op 32110(U)
April 29, 2020
Supreme Court, New York County
Docket Number: 152839/2014
Judge: Shlomo S. Hagler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SHLOMO S. HAGLER** **PART** **IAS MOTION 17EFM**

Justice

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INDEX NO. 152839/2014

MOTION DATE N/A, N/A, N/A

MOTION SEQ. NO. 010 011 012

JONATHAN STRAUGHTER, ARLENE STRAUGHTER,

Plaintiff,

- v -

THOR SHORE PARKWAY DEVELOPERS, LLC, THOR EQUITIES, LLC, BJ'S WHOLESALE CLUB, INC., and B.R. FRIES & ASSOCIATES, LLC,

DECISION + ORDER ON MOTION

Defendant.

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B.R. FRIES & ASSOCIATES, LLC,

Third-Party
Index No. 595386/2014

Third-Party Plaintiff,

-against-

CANATAL STEEL, USA, CHARTIS INSURANCE COMPANY OF CANADA

Third-Party Defendant.

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CANATAL STEEL, USA,

Second Third-Party
Index No. 595049/2015

Second Third-Party Plaintiff,

-against-

CANAL STEEL, INC.,

Second Third-Party Defendant.

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BJ'S WHOLESALE CLUB, INC. and B.R. FRIES & ASSOCIATES, LLC,

Third Third-Party
Index No. 595086/2015

Third Third-Party Plaintiff,

-against-

CHARTIS INSURANCE COMPANY OF CANADA,

Third Third-Party Defendant.
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The following e-filed documents, listed by NYSCEF document number (Motion 010) 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 241, 273, 276, 277, 278, 279, 280, 281, 282, 283, 284, 294, 309

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 274, 285, 286, 287, 288, 289, 290, 291, 292, 293, 295, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 312, 313, 317, 318

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 012) 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 275, 296, 310, 311

were read on this motion to/for JUDGMENT - SUMMARY.

HON. SHLOMO S. HAGLER, J.S.C.:

This is an action to recover damages for personal injuries sustained by plaintiff Jonathan Straughter ("plaintiff") on January 13, 2014, when he fell while descending from a steel structure at a construction site located at 1752 Shore Parkway, Brooklyn, New York (the "Premises").

In Motion Sequence Number 10, defendant Thor Equities, LLC ("Thor Equities") moves for summary judgment dismissing the complaint and cross-claims asserted against it, Thor Shore Parkway Developers, LLC ("Thor Shore") moves for summary judgment on its cross-claim for contractual indemnification against co-defendant B.R. Fries & Associates, Inc. ("B.R. Fries") and for summary judgment dismissing plaintiff's negligence and Labor Law § 200 claims asserted against it. In Motion Sequence Number 11, defendants B.J. Wholesale Club, Inc. ("B.J.'s") and B.R. Fries move for summary judgment dismissing the complaint and all cross-claims and counterclaims asserted against them, and for summary judgment against third-party defendant Canatal Steel, USA ("Canatal") declaring that Canatal is obligated to defend and indemnify B.J.'s

and B.R. Fries. In Motion Sequence Number 12, Canatal moves for summary judgment dismissing the third-party complaint and for summary judgment on its second third-party complaint against Canal Steel, Inc. ("Canal"). Plaintiffs cross-move in response to these motions seeking summary judgment against defendants B.J.'s and B.R. Fries [1]

At oral argument, this Court dismissed the complaint against Thor Equities on grounds it was neither the owner of the site nor had any involvement in the construction site (see transcript at 58) and dismissed plaintiff's negligence and Labor Law § 200 claim against Thor Shore (see transcript at 53, 63). In addition, this Court granted Canatal's unopposed motion for summary judgment against Canal on its Second Third-party complaint (see transcript at 30).

BACKGROUND

On the day of the accident, the owner of the Premises was defendant Thor Shore. Defendant/third third-party plaintiff BJ's was the lessee of the Premises. BJ's contracted with defendant/third-party plaintiff B.R. Fries, as the general contractor, to construct a BJ's store at the Premises. B.R. Fries then contracted with third-party defendant/second third-party plaintiff Canatal, a steel fabricator, to fabricate steel, and install and erect a steel structure at the Premises. Canatal then subcontracted with second third-party defendant Canal to install and erect the steel structure using the steel fabricated by Canatal. At the time of the accident, plaintiff was descending to the ground by sliding down a vertical steel beam (which was about 12-14 feet above ground level). While climbing down from the elevated beam, plaintiff fell and was injured.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, he was employed by Canal and North American Ironworks as an ironworker. Plaintiff testified that he believed both companies were the

[1] Plaintiff Arlene Straughter asserts a derivative action.

same, and that Bob Sattar ("Sattar") owned them both (see Suhail aff, exhibit "I" [deposition 1/16/16] at 75-76, 78-80). Plaintiff was paid by Canal (*id.* at 79). The date of the accident was plaintiff's first date on this jobsite (*id.* at 82). Prior to his accident he was instructed by Sattar to appear at the job site to bolt up the newly erected steel (*id.* at 118, 119, 121-122, 132).

On the morning of his accident, when he arrived at the jobsite at about 6:45 am, he met with his supervisor, Sattar, and then went to the shanty (*id.* at 106, 109). Sattar directed him to the location on the site where he would engage in bolting up steel and told him to permanently bolt the beams that were in the process of being erected (*id.* at 121-122). Plaintiff testified that he took his direction from Sattar in the performance of all his duties (*id.* at 125). Plaintiff brought his own tools with him that day (*id.* at 126). On prior jobs, Sattar had supplied plaintiff with a safety harness or plaintiff had brought his own (*id.* at 131, 134, 140). During the weekend prior to the accident, when Sattar called plaintiff to ask him to work at on this job, plaintiff asked Sattar for a safety harness because he no longer had a harness (*id.* at 133-134). Plaintiff testified that he threw out his old his harness since it was out of date, one of its legs was broken and it would no longer connect (*id.* at 133-134, 136). Sattar told him he would bring plaintiff a new safety harness (*id.* at 138). However, when plaintiff arrived at the job site the morning of the accident, Sattar told him it was urgent that he start working on the project that day because the work was behind schedule (*id.* at 143). Sattar did not have a harness for him, and due to the instructions from Sattar regarding the job he was expected to perform, plaintiff did not ask for a harness (*id.* at 147-148).

Prior to the accident, plaintiff was working on a first-floor beam about 12-14 feet above the ground. To get to that beam, he climbed up part of the way on an A-frame ladder and then grabbed onto a beam and climbed the rest of the way up (*id.* at 144-45). After permanently bolting the right side of the beam, plaintiff needed additional bolts to bolt the left side of the beam (*id.* at

160, 170). Since additional bolts were on the ground, and the A-frame ladder plaintiff used to ascend the structure had been removed, plaintiff had to climb/slide down a vertical column (*id.* at 176-182). During that descent, at about 8:30 a.m., plaintiff fell and was injured (*id.* at 105, 176, 179).

Deposition Testimony of Patrick Dery (Canatal's project manager)

Patrick Dery testified that he was the project manager for the BJ's project (see Showers aff, exhibit "Y"). He further testified that Canatal had a contract with B.R. Fries to supply and deliver the structural steel (*id.* at 10, 14). Canatal then subcontracted with Canal to perform the steel installation for the project (*id.* at 10, 15). Canatal would contact, by phone, Canal's foreman Sattar, to confirm deliveries and check the progress of the work (*id.* at 24). Canatal also sent employee James Emerson to the project site to coordinate logistics for the steel deliveries (*id.* at 26-27). If there was a problem with Canal's work at the project or an accident, Canal would report it to Canatal and Canatal would in turn report it to B.R. Fries (*id.* at 39).

Dery testified that Canatal did not supervise Canal's employees (*id.* at 29). Further, Canal was responsible for its own safety, and for all the employees that were needed for the erection work on the project (*id.* at 33, 53). No one from Canatal investigated plaintiff's accident, and no one from Canatal was at the job site on the day of plaintiff's accident (*id.* at 52, 65).

Deposition Testimony of Casel (Bob) Sattar (plaintiff's supervisor at the jobsite)[2]

Sattar testified that as Canal's field supervisor it was his responsibility to ensure that Canal employees complied with OSHA regulations (see Showers aff, exhibit "Z" [deposition 11/17/16] at 33). Further, Canal employees at the BJ's jobsite would have been issued a harness and were expected to use a lifeline; a vertical cable suspended from a column, a "beamer" (*id.* at 62, 63, 65).

[2] Casel Sattar testified that people refer to him as Bob (Showers aff, exhibit "Z" [deposition 11/17/16] at 33) at 9)

A worker on the ground level could tie off their harness to a "retractable" before going up a ladder (*id.* at 65, 68). Sattar stated that beamers and retractables were used at the Premises since the beginning of the project (*id.* at 69-70).

If a worker was working from a height bolting up beams, he would be required to have a harness and to be tied off (*id.* at 62). Sattar testified that when plaintiff arrived at the jobsite the morning of the accident, plaintiff had a safety harness and wore it at all times (*id* at 76-77). Immediately before the accident, Sattar saw plaintiff "swinging like a kid" from the bottom of a steal beam (*id.* at 117, 127-128). Sattar testified that when he saw plaintiff hanging from the beam, he was wearing a harness provided by Canal (*id.* at 132).

However, when Sattar was shown a picture of the jobsite on the day of the accident, he acknowledged that plaintiff was in the photo bolting up beams and was not wearing a harness (*id.* at 81-82). He also acknowledged upon examining the photo that other workers were not tied off to a lifeline (*id.* at 85-86). Further, he did not see any retractables or beamers at the location of the accident (*id.* at 90)

Sattar testified that the only conversations he had with anyone at Canatal was with Patrick Dery regarding scheduling steel deliveries (see Suhail aff, exhibit "O" [deposition 5/23/17] at 42-43). Sattar stated that he never raised any jobsite safety concerns with Canatal (*id.* at 44-45). Sattar acknowledged that Canatal did not provide any workers for the project, including workers who offloaded steel from the trucks delivering the steel fabricated by Canatal (*id.* at 57).

Deposition Testimony of Stephen Scofield (B.R. Fries's Director of Operations)

Scofield testified that he was a project manager for B.R. Fries at the BJ's construction project commencing in April 2014 (see Showers aff, exhibit "W" [deposition 5/3/17] at 11). At the time of the accident, B.R. Fries employed two full time superintendents, Randy Telford and

Arthur Schumann (*id.* at 18). Their duties included enforcing compliance with B.R. Fries's safety and health program and doing daily inspections of the site to ensure compliance (*id.* at 20-21). Scofield stated that B.R. Fries's responsibility to provide safety equipment applied only to B.R. Fries's employees. However, Telford and Schumann did regular walk-throughs to check on the progress of the work and identify unsafe conditions (*id.* at 22-24, 51-52). If they noticed that subcontractor employees were not provided with appropriate protective equipment, they would notify the subcontractor (*id.* at 24-25, 52-53). They also had authority to stop work if they noticed an unsafe condition (*id.* at 53)

Scofield testified that Canatal did not have any employees at the jobsite (*id.*, exhibit "X" [deposition 1/10/17] at 65). He only recalled speaking to a Canatal employee, Patrick Dery, once by telephone for the purpose of change order resolution, billing and payment (*id.* at 66).

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to summary judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (*Santiago v Filstein*, 35 AD3d 184, 185-86 [1st Dept 2006] quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Whether Plaintiff's Cross-Motion is Timely

Plaintiff cross-moves for summary judgment in his favor as to liability on the Labor Law §§ 240 (1) and 241 (6) claims against defendants B.J.'s and B.R. Fries. Defendants B.J.'s and B.R. Fries argue that plaintiff is not entitled to summary judgment in his favor because his cross-motion is untimely, in that it was made 75 days after the expiration of the court's 60-day deadline for bringing such motions. Plaintiff concedes that his cross-motion is untimely. However,

> "[a] cross motion for summary judgment made after the expiration of the [60-day] period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief 'nearly identical' to that sought by the cross motion. An otherwise untimely cross motion may be made and adjudicated because a court, in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross motion (CPLR 3212 [b]). The court's search of the record, however, is limited to those causes of action or issues that are the subject of the timely motion"

(*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006] [internal citations omitted]; *see also Guallpa v Leon D. DeMatteis Constr. Corp.*, 121 AD3d 416, 419-420 [1st Dept 2014], citing *Filannino*).

Here, that part of plaintiff's cross-motion seeking relief on his Labor Law § 240 (1) and § 241 (6) claims are "nearly identical" to that raised by defendants B.J.'s and B.R. Fries in their motion to dismiss these claims against them. Defendants B.J.'s and B.R. Fries also oppose the cross-motion on the merits. Therefore, this Court will consider plaintiff's request for summary judgment in his favor as to defendants B.J.'s and B.R. Fries on his Labor Law § 240 (1) and § 241 (6) claims. Notwithstanding the above, this Court may, and will, search the record on summary judgment in favor of plaintiff as defendants B.J.'s and B.R. Fries raised the issue of liability on their Labor Law § 240 (1) and § 241 (6) claims.

The Labor Law § 240 (1) Claim (motion sequence number 011 and plaintiff's cross-motion)

Plaintiff cross-moves for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against BJ's and B.R. Fries. BJ's and B.R. Fries move to dismiss the Labor Law § 240 (1) claim against them. Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

"Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold ... or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

> "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein"

(*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Hill v Stahl* 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]).

Plaintiff argues that he is entitled to summary judgment in his favor as to liability because he has sufficiently established that, due to the lack of a harness, and the inability to tie off the harness, even if he had one, he fell while descending from an elevated beam. In support of his motion, plaintiff submits the affidavit of Diego Dumas, a co-worker, who states that no fall protection equipment had been provided to the plaintiff at the time of his accident, including a harness or retractable lanyard (see Turnbull aff, exhibit "4").

In support of its motion for summary judgment dismissing plaintiff's § 240 (1) claim, BJ's and B.R. Fries argue that plaintiff's § 240 (1) claim should be dismissed on grounds that plaintiff was the sole proximate cause of his accident in that he elected to climb down from the beam rather than wait for another worker to replace the ladder for him to use. Likewise, when initially using the ladder to go up to start bolting the beam, plaintiff did not tie off the ladder which would have prevented it from being removed by a co-worker. Further, plaintiff knew that having a safety harness was one of the requirements in order to work at this job, yet he proceeded to work without the harness. Notably, according to B.J's and B.R. Fries, when plaintiff arrived at the jobsite, he niether asked Sattar for a harness nor did he obtain one from the Canal Street gang box or shanty. In essence, BJ's and B.R. Fries are claiming that plaintiff was a recalcitrant worker.

A plaintiff will be determined to have been recalcitrant when "(a) [the] plaintiff had adequate safety devices at his disposal; (b) he both knew about them and that he was expected to use them; (c) for 'no good reason' he chose not to use them; and (d) had he used them he would not have been injured" (*Tzic v Kasampas*, 93 AD3d 438, 439 [1st Dept 2012] citing *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 10 [1st Dept 2011]).

Here, on the day of the accident, the first day plaintiff was at the jobsite, he contends that he arrived without a harness and was directed to bolt up beams at a height of about 12-14 feet.

Despite asking for a harness during a call with Sattar the weekend prior to starting work, Sattar did not provide plaintiff with a harness. Sattar testified that plaintiff arrived with a harness and wore one at all times. However, when shown a picture taken of the jobsite on the day of the accident, Sattar acknowledged that plaintiff was not wearing a harness. Further, while Sattar stated that beamers and retractables were used at the jobsite since its inception, when shown a picture of the area of the accident taken before the accident occurred, Sattar acknowledged that there were no retractables at the site of the accident, and no one, including plaintiff, was wearing a harness.

In *Anderson v MSG Holdings, L.P.* (146 AD3d 401 [1st Dept 2017]), the court held that while plaintiff was furnished with a harness, defendants did not refute his claim that there was no place for him to tie off the harness (id. at 403). Thus, whether or not plaintiff was provided with a harness or wore his own, by Sattar own's admission at his deposition, there was no retractable or anchor point for use by the plaintiff to tie off. To the extent plaintiff's own conduct may have contributed to his fall, refusing to tie off to an anchorage point, or climbing down the beam instead of waiting for the ladder to be replaced, does not make plaintiff the sole proximate cause of the accident, and comparative negligence is not a defense to a Labor Law § 240 (1) claim (*see Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008] ["the Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'", quoting *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 920 (2003)]. Moreover, to the extent that BJ's and B.R. Fries claim that, if in fact, plaintiff did not have a harness, he should have gotten one from the shanty, "[t]he Labor Law, recognizing the realities of construction and demolition work, does not require a worker to demand an adequate safety device by challenging his or her

supervisor's instructions and withstanding hostile behavior" (*DeRose v Bloomingdale's Inc.*, 120 AD3d 41, 47 [1st Dept 2014]). "To place that burden on employees would effectively eviscerate the protections that the legislature put in place" (*id.*).

Accordingly, plaintiff is entitled to summary judgment on his Labor Law § 240 (1) claim (*see Berrios v 735 Ave. of the Ams., LLC*, 82 AD3d 552, 553 [1st Dept 2011] *quoting Milewski v Caiola*, 236 AD2d 320, 320 [1st Dept 1997] ["even if plaintiff could be found recalcitrant for failing to use a harness, defendants' 'failure to provide proper safety [equipment] was a more proximate cause of the accident'"]; *Miglionico v Bovis Lend Lease, Inc.*, 47 AD3d 561, 565 [1st Dept 2008] [even assuming a harness had been provided, the only conclusion supported by the record is that they would not have provided the necessary protection]). Therefore, BJ's and B.R. Fries's motion for summary judgment dismissing plaintiff's 240 (1) claim is denied.

The Labor Law § 241 (6) Claim (motion sequence number 11 and plaintiff's cross-motion)

Plaintiff cross-moves for summary judgment in his favor as to liability on his Labor Law § 241 (6) claim against BJ's and B.R. Fries. These defendants move for dismissal of this claim against them. Labor Law § 241 (6) provides, in relevant part:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a non delegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (*see Ross v Curtis-Palmer Hydro-Elec.*

Co., 81 NY2d 494, 501-502 [1993]). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstanding a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.*).

Although plaintiff alleges multiple violations of the Industrial Code in the bill of particulars, with the exception of Industrial Code section 23-1.16, plaintiff does not move for summary judgment in his favor, nor does he oppose dismissal of these sections, and therefore, they are deemed abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]). Thus, BJ's and B.R. Fries are entitled to summary judgment dismissing those parts of plaintiffs' Labor Law § 241 (6) claim predicated on the abandoned provisions.

Initially, Industrial Code section 23-1.16 is sufficiently specific to sustain a claim under Labor Law § 241 (6) (*see Jerez v Tishman Constr. Corp. of N. Y.*, 118 AD3d 617, 618 [1st Dept 2014]; *Macedo v J. D. Posillico, Inc.*, 68 AD3d 508, 510 [1st Dept 2009]).

Industrial Code section 23-1.16 (b) provides:

> "(b) Attachment required. Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employer. At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet."

(12 NYCRR 23-1.16[b]).

Plaintiff argues that BJ's and B.R. Fries violated section 23-1.16 because there was no lifeline available for him to attach his harness at the time of the accident, and Sattar acknowledged that there were no beamers or retractables available to plaintiff at the time of the accident (see *Anderson v MSG Holdings, L.P.*, 146 AD3d 401, 405 [1st Dept 2017] ["while plaintiff was provided with a safety harness, he was not provided with a proper place to which to tie off his harness"]). Therefore, plaintiff is entitled to partial summary judgment as to liability on his Labor Law § 241 (6) claim with respect to Industrial Code 23-1.16, and BJ's and B.R. Fries's motion to dismiss plaintiff's Labor Law § 241 (6) claims, with the exception of Industrial Code 23-1.16, are granted.

Plaintiff's Common Law Negligence and Labor Law § 200 claims against BJ's and B.R. Fries (motion sequence number 11 and plaintiff's cross-motion)

BJ's and B.R. Fries move for dismissal of plaintiff's common-law negligence and Labor Law § 200 claims against them. Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000] [internal quotation marks and citations omitted]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]). Labor Law § 200 provides, in relevant part:

> "1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to Section 200 cases, depending on the type of situation involved: when the accident is the result of the means and methods used by the contractor to do its work, and when the accident is the result of a dangerous condition (*see McLeod v*

Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts., 41 AD3d 796, 797-98] [2d Dept 2007]).

It is well settled that in order to find an owner or its agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods and materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where plaintiff's injury was caused by lifting a beam and there was "no evidence that defendant exercised supervisory control or had any input into how the steel beam was to moved"]).

Moreover, "general supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor controlled the manner in which the plaintiff performed the work, i.e., how the injury-producing work was performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007][no Labor Law § 200 liability where defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]).

When the accident arises from a dangerous condition on the property, the proponent of a Labor law § 200 claim must demonstrate that the defendant created or had actual or constructive notice of the alleged unsafe condition that caused the accident, and the plaintiff need not demonstrate that the defendant exercised supervision and control over the work being performed (*see Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004]) .

At the time of the accident, plaintiff was injured as a result of falling while descending from a height. Plaintiff may or may not have had a harness, but he had no beamers or retractable lines to tie off to. Therefore, the accident occurred as a result of the means and methods of

plaintiff's work. However, there is no evidence in the record before this Court that B.R. Fries had anything other than a mere supervisory control of the steel work for the BJ's project (see *Hughes v Tishman Constr. Corp.*, 40 AD3d at 306). Likewise, there is no evidence that BJ's or B.R. Fries had actual supervisory control or input into how plaintiff's work was performed (*id.*). Accordingly, BJ's and B.R. Fries are entitled to dismissal of plaintiff's Labor Law § 200 claim against it.[3]

Thor Shore's Motion for Contractual Indemnification and a Defense against Fries (motion sequence number 010).

Thor Shore argues that pursuant to the following contractual language, in the construction contract between BJ's and Fries, it is entitled to summary judgment on its claim for contractual indemnification and a defense against B.R. Fries:

> "To the fullest extent permitted by law [B.R. Fries] shall indemnify and hold harmless [BJ's]...[BJ's] landlord(s)....from and against all claims, damages, losses, expenses (including but not limited to, attorney's fees and expenses), liabilities...court orders and judgments...arising out o[f] and/or resulting from any and all acts, breaches, failures to act, omissions, negligence or fault of [B.R. Fries], anyone employed by it or its agents and anyone for whom [B.R. Fries] is responsible, regardless of whether a Claim is caused in whole or in part by any act, breaches, failure to act, omission, negligence or fault of any of the Indemnitees and the Contractor shall bear all expenses, costs and fees (including attorney's fees and expenses) which the Indemnitees have or may have by reason thereof...unless such Claim is solely caused by the Indemnitees' act, failure to act, [etc.]"

(see Kisyk aff, exhibit "L" at AIA Document A201-2007, pg. 18, § 3.18.1).

The language above unequivocally establishes that B.R. Fries agreed to defend and indemnify BJ's and its landlord (Thor Shore) for any claims arising out of the work overseen by B.R. Fries in its capacity as general contractor.

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[3] At oral argument this Court dismissed plaintiff's Labor Law § 200 claim against both Thor entities (see transcript at 53).

Further, the construction contract states that "[B.R. Fries] shall be solely responsible for, and have control over, construction means, methods, techniques, field conditions, sequences and procedures and for coordinating all portions of the Work" and "that [B.R. Fries] shall evaluate jobsite safety thereof and....shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences or procedures." In addition, "[B.R. Fries] shall be responsible to [BJ's] for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for, or on behalf of, the Contractor or any of its Subcontractors" (*id.* at 12, § 3.3.1; 3.3.2).

Based upon this contractual language, Thor Shore's motion for summary judgment on its claim for contractual indemnification and a defense against B.R. Fries is granted (*see generally Higgins v TST 375 Hudson, L.L.C.*, 179 AD3d 508 [1st Dept 2020]). Although BJ's and B.R. Fries claim this motion is premature because Thor Shore may be found to be at fault for the accident, B.J's and B.R. Fries offer no evidence to suggest that Thor Shore was negligent with respect to plaintiff's accident.

Third Party Complaint (motion sequence number 011 and 012)

Third-party defendant/second third party plaintiff Canatal is seeking dismissal of the third-party action. In the third-party action commenced by B.R. Fries against Canatal and Chartis Insurance Company of America, B.R. Fries is seeking contractual indemnification, damages for Canatal's failure to procure insurance, common law indemnification, and contribution from Canatal, and a declaration against Chartis Insurance Company of America that it has a duty to defend and indemnify it.

Contractual Indemnification

B.R. Fries argues that it is entitled to contractual indemnification based upon the following provisions of the contract between it and Canatal:

> The terms and conditions of this Rider shall supersede and govern any inconsistent term found in other parts of the written agreement and other riders between the parties.
>
> 1. Indemnity. In consideration of the Contract Agreement, and to the fullest extent permitted by law, [Canatal] shall defend and shall indemnify, and hold harmless, at [Canatal's] sole expense, [B.R. Fries], all entities [B.R. Fries] is required indemnify and hold harmless, the Owner [BJ's] of the property, and the officers, directors, agents, employees, successors and assigns of each of them from and against all liability or claimed liability for bodily injury or death to any person(s), and for any and all property damage or economic damage, including all attorney fees, disbursements and related costs, arising out of or resulting from the Work covered by this Contract Agreement to the extent such Work was performed by or contracted through [Canatal] or by anyone for whose acts [Canatal] may be held liable, excluding only liability created by the sole and exclusive negligence of the indemnified Parties. This indemnity agreement shall survive the completion of the Work specified in the Contract Agreement.
>
> 2. Insurance. [Canatal] shall procure and shall maintain until final acceptance of the Work, such insurance as will protect [B.R. Fries], all entities [B.R. Fries] is required [to] indemnity and hold harmless, the Owner [BJ's], and their officers, directors, agents and employees, for claims arising out of or resulting from [Canatal's] Work under this Contract Agreement, whether performed by [Canatal], or by anyone directly or indirectly employed by [Canatal], or by anyone for whose acts [Canatal] may be liable. Such insurance shall be provided by an insurance carrier rated "A-" or better by A.M. Best and lawfully authorized to do business in the jurisdiction where the Work is being performed.

(see Shower aff, exhibits "F" and "L").

A party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor (see General Obligations Law § 5-322.1; *Reynolds v County of Westchester*, 270 AD2d 473 [2d Dept 2000]).

B.R. Fries argue that contrary to Canatal's argument, that it had no presence on the jobsite, the contract entitles it to indemnification regardless of Canatal's lack of such presence. Moreover, B.R. Fries maintain that there is no dispute that plaintiff's accident arose out of the work being performed pursuant to the contract between B.R. Fries and Canatal. That Canatal chose to then subcontract out the installation and erection of the steel structure to Canal, does not, according to B.R. Fries, absolve Canatal of its obligations pursuant to its contract with B.R. Fries. Moreover, B.R. Fries argues that there is no evidence that it was negligent. Rather, it was Canal, Canatal's subcontractor, who was negligent in failing to provide adequate safety protection to its employees.

Here, there is no dispute that Canatal fabricated steel for the project and then delivered it to the project. Canatal had no presence at the jobsite and did not supervise or control any work performed at the jobsite, nor was Canatal responsible for safety at the jobsite. Rather, Canatal subcontracted with Canal to install and erect the steel structure at the site and to supervise/control/monitor that work at the construction site.

However, as B.R. Fries correctly argues Canatal's freedom from negligence does not obviate the indemnification provision of its contract with B.R. Fries. While B.R. Fries has been held liable on plaintiff's statutory Labor Law §§ 240 (1) and 241 (6) claims (only to the extent of § 241(6) liability based on Industrial Code § 23-1.16), this Court determined that B.J's and B.R. Fries were entitled to dismissal of plaintiff's negligence and Labor Law § 200 claims.

Accordingly, B.R. Fries has established prima facie entitlement to summary judgment against Canatal on its contractual indemnification claim, and Canatal has not raised an issue of fact precluding summary judgment in B.R. Fries's favor.

Failure to Procure Insurance

BJ's and B.R. Fries do not dispute that Canatal procured proper insurance for this project. Accordingly, Canatal is entitled to dismissal of this claim.

Common Law Indemnification

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident' " (*Perri v Gilbert Johnson Enters. Ltd.*, 14 AD3d 681, 684-85 [2d Dept 2005] quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; see *Priestly v Montifiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004].

As noted above, there is no evidence that Canatal was negligent or that it caused or contributed to plaintiff's accident. Accordingly, Canatal is entitled to dismissal of the common law indemnification claim.

Contribution

To be able to obtain contribution under CPLR 1401, the tortfeasor's liability must pertain to the same injury. "A party seeking contribution must show that the third-party defendant from whom contribution is sought owes a duty either to him or to the injured party and that a breach of that duty contributed to the alleged injuries" (*Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 125 AD2d 754, 756 [3rd Dept 1986], affd 71 NY2d 599 [1988]). As already noted, there is no evidence that Canatal owed to a duty to plaintiff or that it breached that duty which contributed to his accident. Accordingly, B.R. Fries' claim for contribution must be dismissed.

Canatal Motion for Summary judgment on its Second Third Party Complaint (motion sequence number 012)

At oral argument, the court granted Canatal's unopposed motion for summary judgment against Canal on its second third-party complaint.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that defendants Thor Shore Parkway Developers LLC and Thor Equities LLC motion (motion sequence number 010), for summary judgment dismissing all claims against Thor Equities, LLC is granted, for summary judgment on its cross-claim against B.R. Fries for contractual indemnification is granted, and for summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims is granted; and it is further

ORDERED that plaintiff's cross-motion (as well as independently searching the record under CPLR 3212) for summary judgment against BJ's Wholesale Club, Inc. and B.R. Fries & Associates, LL on his Labor Law § 240 (1) and § 241 (6) claims with respect to Industrial Code section 23-1.16 only, is granted, and is otherwise denied; and it is further

ORDERED that defendants BJ's Wholesale Club, Inc. and B.R. Fries & Associates, LLC motion (motion sequence number 011) for summary judgment dismissing plaintiff's Labor Law § 200, common law negligence, and Labor Law 241 (6), with respect to all claims except Industrial Code 23-1.16, is granted; for summary judgment on its third-party complaint against Cantal Steel USA, Inc, on its contractual indemnification claims is granted; and, the motion is denied in all other respects; and it is further

ORDERED that defendant Canatal Steel USA, Inc.'s motion (motion sequence number 012) for summary judgment on its second third-party complaint against Canal Steel, Inc., is granted, and for summary judgment dismissing the third-party complaint is granted with respect to BJ's Wholesale Club, Inc. and B.R. Fries & Associates, LLC's claims for failure to obtain insurance, common law indemnification, and contribution, and is otherwise denied.

Dated: April 29, 2020

ENTER:

SHLOMO S. HAGLER, J.S.C.

J.S.C.